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No. 89-1667

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAY PALMER, et al.,
Petitioners,

v.

BRG OF GEORGIA, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF PARTIES AND RULE 29.1 STATEMENT

The parties to the proceedings below were the Petitioners Jay L. Palmer, Benjamin M. First, Michael L. Chidester, Teri L. Powers, David Dunbar, and William R. Ferguson, seeking to represent a class of purchasers of respondents' bar review course in northeast Georgia between 1984 and the present, and the Respondents BRG of Georgia, Inc., Bar Review Group, Inc., BRG Publications, Inc., Harcourt Brace Jovanovich Legal and Professional Publications, Inc., and Ronald O. Pelletier. Harcourt Brace Jovanovich Legal and Professional Publications, Inc. is a subsidiary of Harcourt Brace Jovanovich, Inc.* Amicus Curiae briefs were filed in the Court of Appeals by the United States of America, Bryan Downs, and Margaret Murphy.

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* In compliance with Rule 29.1, the following are the subsidiaries of Harcourt Brace Jovanovich, Inc. which Harcourt Brace Jovanovich, Inc. does not wholly own: Harcourt Brace Jovanovich, Japan, Inc. and The Harvest Life Insurance Agency, Inc. Through the wholly-owned subsidiary HRW and WBS Canada Corporation, Inc., the corporation also owns interest in Holt, Rinehart and Winston of Canada Limited, Les Editions HRW Ltee., and W.B. Saunders Canada Limited.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Eleventh Circuit's opinion affirming judgment in favor of the Respondents.

STATEMENT OF THE CASE

This case involves the second proposed antitrust class action against respondents Harcourt Brace Jovanovich Legal and Professional Publications, Inc. ("HBJ Legal") and BRG of Georgia, Inc. ("BRG"). The first lawsuit challenged an agreement executed by the respondents in 1980 in which HBJ Legal licensed copyrighted bar review materials to BRG for use in BRG's bar review course in Georgia. That agreement was negotiated only after HBJ Legal had decided, for its own legitimate reasons, to stop offering its own bar review course in Georgia. R2-14, Ex. B, 2; Conviser Dep. at 30-31.

The litigation which the petitioners now seek to have reviewed involves a challenge to respondents' alleged conduct after execution of a new license agreement in 1982. The uncontradicted purpose of the 1982 agreement was to facilitate a compromise of the first lawsuit, and to make clear, by affirmatively removing BRG's exclusive right to license and use HBJ Legal's materials in Georgia, that HBJ Legal and BRG were free to compete with each other in offering courses in Georgia. R2-14, Ex. B, ¶ 6 and Ex. C, ¶¶ 8-9 and Ex. D.[1] After entering the 1982

[1] The respondents and plaintiffs' counsel advised the district court considering approval of the class settlement in the first lawsuit of the elimination of the exclusive right, a fact which that court noted in its approval of the settlement. R2-14, Ex. A, ¶ VI. The attorney who appeared as counsel for the named plaintiffs in both lawsuits submitted an affidavit in the first case in support of settlement approval and his own application for attorney's fees in which he declared that "defendants have ended their exclusive licensing arrangement, thus opening the way for increased competition in the bar review market." R1-9A, Ex. B.

agreement, HBJ Legal in fact sought other licensees (although without success) to use its materials in Georgia in competition with BRG. R2-14, Ex. B, ¶ 9. After entering the 1982 agreement, there was no communication at all between the principals of HBJ Legal and BRG. *Id.*, ¶ 8. The only evidence in the record on the post-1982 relationship of HBJ Legal and BRG consisted of the sworn testimony of the principals of the two companies that the 1982 agreement accurately, completely and entirely expressed a relationship in which each company was free to compete with the other wherever and however it chose. R2-14, Ex. B, ¶ 6 and Ex. C, ¶ 9.

The complaint in this, the second lawsuit, made no reference at all to the 1982 agreement.[2] The petition for certiorari recites the execution of the new agreement (at 10), but thereafter all but ignores the 1982 agreement.

[2] None of the named plaintiffs were told by their counsel that a new agreement had been executed. Dunbar Dep. at 61; Fist Dep. at 31-32; Palmer Dep. at 28-29; Chidester Dep. at 24; Powers Dep. at 21-22; Ferguson Dep. at 44.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's opinion states no new legal standard on horizontal market allocation because the Eleventh Circuit made clear in the modification of its original opinion that there was no evidence that the respondents competed with each other. The Eleventh Circuit properly refused to apply a *per se* rule of antitrust liability to a vertical relationship. The decision does not raise the issue which petitioners claim is presented.

Petitioners were properly required to offer competent market structure evidence in support of their rule of reason theory. Petitioners failed to offer evidence of a "naked" restraint which would have authorized a "quick look" rule of reason analysis, and failed to make any threshhold showing that the commonly utilized royalty and exclusive trade name provisions of the agreement between respondents were in any way unreasonable. The Eleventh Circuit's rejection of such conclusory and inadmissible market structure evidence as the petitioners did offer was proper, and does not merit this Court's consideration.

This case presents no occasion for exercise of this Court's supervisory power over the Eleventh Circuit. The decision below followed this Court's authority on the controlling issues. Petitioners' speculation about the panel's asserted failure to review the record is wholly unwarranted.

ARGUMENT: REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION DOES NOT STATE ANY NEW OR DIFFERENT STANDARD ON HORIZONTAL "PRICE-FIXING" AND "MARKET ALLOCATION."

The petitioners' argument that the Eleventh Circuit has deliberately and improperly departed from well-established precedent on *horizontal* "price-fixing" and "market allocation" is based on a false premise. The petitioners wrongly assume, or simply assert, that the Eleventh Circuit's opinion addresses relationships between *horizontal* competitors.

The Eleventh Circuit initially held that the relationship between HBJ Legal and BRG was not "a classic form of price-fixing where *two competitors* agreed what price they would charge for their products," *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417, 1424 (11th Cir. 1989), *modified*, 893 F.2d 293 (11th Cir. 1990) (emphasis added), and that the record did not show a situation "where *competitors* divided up a market *in which both were doing business*, each taking a portion of the market," *id.* (emphasis added). It is the use of these words that petitioners challenge. Petition at 16. The language was intended to convey only the conclusion that because HBJ Legal and BRG were not in fact competitors in 1985, they could not be found to have entered any horizontal conspiracy. The Justice Department filed an amicus brief at the rehearing stage because the Eleventh Circuit had not clearly indicated that its opinion addressed a vertical, not a horizon-

tal, relationship.[3] The Eleventh Circuit removed the ambiguity on this point in its subsequent modification of its opinion:

> We agree with the district court that the modified agreement (1982) is not a market allocation agreement to which per se liability applies. First, the agreement is not a "naked" agreement between competitors to allocate the market. Second, HBJ and BRG are not horizontal competitors. HBJ's affidavit states that it is no longer a competitor in the Georgia market. The appellants have failed to produce evidence to the contrary. In the absence of evidence other than the affidavit on this issue, we cannot conclude that HBJ is doing business in Georgia.

Palmer (as modified), 893 F.2d 293.

The Eleventh Circuit's opinion does nothing more than reaffirm well-established law that *vertical* arrangements are to be tested under the rule of reason.

Petitioners' real disagreement with the Eleventh Circuit is on the sufficiency of their evidence to establish a horizontal relationship, not on whether some putative horizontal relationship was or was not *per se* illegal. While this case thus involves the applicability of Fed. R.

[3] The Justice Department indicated that its concern was with a holding that could be read as a "limitation of the per se prohibition on market allocation by *horizontal* competitors to circumstances in which parties to the agreement divide between themselves a market *in which both were doing and continue to do business*." Memorandum Of The United States of America As Amicus Curiae In Support Of Suggestion Of Rehearing En Banc at 2-3. The Justice Department otherwise expressly took "no position" concerning the merits of the case. *Id.* at 2.

Civ. P. 56 to Sherman Act Section One conspiracy cases, it does not raise the substantive antitrust question that petitioners attempt to have this Court address. *See* Petition at i, "Question Presented [No.] 1."

II. PETITIONERS WERE PROPERLY REQUIRED TO OFFER COMPETENT MARKET STRUCTURE EVIDENCE TO SUPPORT THEIR "RULE OF REASON" THEORY.

This case does not raise the Sherman Act Section One "rule of reason" issues that petitioners would have this Court address because the petitioners failed to produce evidence of an *unreasonable agreement* that needed to be evaluated, either with or without consideration of market structure evidence.

The petitioners persistently sidestep the undisputed fact that there was no evidence in the record that, after the 1982 agreement dispensed with BRG's exclusive right to license and use HBJ Legal's materials in Georgia, HBJ Legal and BRG had any understanding on the prices either of them would charge purchasers, or where or how either of them would compete in Georgia or elsewhere. The record showed only that there was no post-1982 communication between the principals of HBJ Legal and BRG on any subject (R2-14, Ex. B, ¶ 8); that HBJ Legal in fact sought additional licensees to compete with BRG in Georgia (R2-14, Ex. B, ¶ 9); and that HBJ Legal and BRG affirmatively denied the existence of any understanding other than as set forth in the 1982 agreement (R2-14, Ex. B ¶ 6 and Ex. C, ¶ 9). The Eleventh Circuit correctly concluded, in language that petitioners consistently omit from their quotation of the Eleventh Circuit's opinion as modified, that

petitioners simply "failed to produce evidence to the contrary." *Palmer* (as modified), 893 F.2d 293.

The Eleventh Circuit's determination that petitioners had failed to produce evidence from which a horizontal conspiracy to fix prices or allocate customers could be inferred takes away the predicate for both branches of petitioners' "rule of reason" argument.

In a transparent effort to excuse their failure to submit admissible evidence on the alleged markets in question, petitioners first argue that *NCAA v. Board of Regents*, 468 U.S. 85 (1984), *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1987), and *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990), did not require market structure proof. Contrary to the uncontradicted facts in this case, however, all of those cases in fact involved a "naked" restraint of trade, *i.e.*, a restraint which would in all likelihood be classified as *per se* illegal but for some potential policy or other justification. Thus, in *NCAA*, this Court agreed with the trial court's finding that the challenged conduct constituted "horizontal price-fixing," but decided that applying the *per se* rule to "an industry in which horizontal restraints on competition are essential if the product is to be available at all" could not be justified. 468 U.S. at 100-01. Similarly, in *Indiana Federation*, the challenged agreement to withhold services from customers was found to be the equivalent of a "joint refusal to compete with respect to the price term of an agreement," 476 U.S. at 459, but subject, potentially at least, to possible justification.[4] As the Eleventh Circuit correctly held, however, no such "naked" restraint is involved here.

[4] The Seventh Circuit's holding in *Wilk v. American Medical Association*, 895 F.2d 352 (7th Cir. 1990), on which petitioners also rely, involved what the Seventh Circuit described as a "group boycott[], typically . . . held unlawful *per se*," saved from automatic condemnation only by the Seventh Circuit's perception that this Court has been reluctant to treat rules adopted by professional associations as unreasonable *per se*. *Id.* at 358-59. The restraint in *Wilk* was just as "naked" as those in *NCAA* and *Indiana Federation*.

Having failed to produce proof of a "naked" restraint that would have authorized the kind of "quick look" analysis actually utilized in *NCAA*, *Indiana Federation* and *Wilk*, petitioners next argue that mere "detrimental effects" alone establish a "rule of reason" violation. Under their theory, market structure proof would apparently never have to be offered in a "rule of reason" case.

NCAA, *Indiana Federation* and *Wilk* did not reverse a century of antitrust jurisprudence. Petitioners were still required to make some threshhold showing that the restraints challenged were in fact unreasonable. Petitioners can now point, however, only to normal and common provisions in the 1982 agreement involving the royalty fees to be paid by BRG to HBJ Legal (*not* what BRG was to charge its customers) and the exclusive license (in Georgia) of one of HBJ Legal's trade names. *See* Petition at 10. The royalty clause had no different effect than any other wholesaler's price to a retailer. Such arrangements have been consistently upheld by the courts. *See, e.g.*, *General Cinema Corp. v. Buena Vista Distribution Co.*, 681 F.2d 594, 597-98 (9th Cir. 1982) (approving similar royalty formula). The trade name restriction similarly could not

have had any unreasonable effect in any way different from thousands of similar arrangements. While petitioners alleged that those common clauses unreasonably restrained trade, petitioners failed by admissible evidence to show that market conditions were such that these otherwise common and lawful provisions had some uncommon or prohibited effect. That effect cannot be shown without market analysis, and *NCAA*, *Indiana Federation* and *Wilk*, all of which actually involved "naked" restraints, did not eliminate that requirement. This case is not in conflict with any of the precedent petitioners cite.[5]

Finally, petitioners argue that such market structure proof as they did offer was sufficient to satisfy Sherman Act standards. The case law establishes, however, that proof of relevant markets must be based on admissible evidence, and that testimony from experts must conform to the Federal Rules of Evidence. The speculative and conclusory testimony and affidavits from purported experts that petitioners offered failed to satisfy their burden in resisting respondents' motion for summary judgment.

The artificial market petitioners tried to prove consisted of the particular form of course they took, offered at the specific time of year and at the specific place at which they took their course. R3-41A-6. Petitioners' first expert,

[5] Petitioners attempt, as an apparent afterthought, to resurrect a conspiracy to monopolize claim in this portion of their argument. Their effort merits no attention because, in addition to failing to produce any competent evidence as to market structure, petitioners failed to offer evidence of conspiracy (*see* part I), specific intent to monopolize or overt acts in furtherance of any supposed conspiracy. *See generally American Tobacco Co. v. United States*, 328 U.S. 781 (1964), requiring proof of all of these elements.

Dr. Henry, attempted to define a market so narrow as to include only 181 potential customers, even though the evidence showed that bar review courses were offered statewide. *Id*. The Eleventh Circuit properly joined the district court in rejecting the proffered testimony as conclusory, and unsupported by competent analysis. *Palmer*, 874 F.2d at 1427-28. The petitioners' second "expert" was their own counsel, who offered his own self-serving opinions, which were in turn based on a survey he conducted without establishing the competence of the survey, and which was inadmissible under even the most relaxed evidentiary standards.[6] The Eleventh Circuit followed well-established authority in holding that these expert affidavits were without evidentiary value. *See American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985) (rejecting "expert" affidavit by the same Dr. Henry petitioners utilized in this case).

The implausibility of the market the petitioners claimed, and the unsurprising lack of competent evidence to support the existence of such a market, warranted summary judgment. The issue of the adequacy of plaintiffs' proof on this point raises no issue that merits this Court's consideration on certiorari.

[6] The third "expert" the petitioners "offered" was the economist their counsel had retained in the first lawsuit, but chose not to use again in this lawsuit. His testimony was in the record only because petitioners filed a copy of his deposition from the first case in this case. That testimony addressed a time frame not at issue in this case, and in fact contradicted petitioners' position here because that expert advocated the existence of an alleged statewide market, not the artificial one time of year, one place market the petitioners sought to prove in this case. Kamerschen Dep., *passim*.

III. NO EXERCISE OF THE COURT'S SUPERVISORY POWER OVER THE ELEVENTH CIRCUIT IS WARRANTED.

Contrary to petitioners' claim, the Eleventh Circuit's application of summary judgment standards was consistent with those set forth by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); and *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515 (1988). Petitioners object to the Eleventh Circuit's rejection of their attempt to satisfy their burden of surviving respondents' summary judgment motion by relying on self-serving, conclusory speculation. Petitioners simply had no admissible evidence to support their claims that the 1982 license agreement, or respondent's actions under that agreement, violated the Sherman Act.

Petitioners' final suggestion that the two judges on the panel who disagreed with the petitioners must not have reviewed the full record because their principal residences are not in Atlanta where the Eleventh Circuit maintains its case files, and because the Eleventh Circuit rules preclude the submission of appendices on appeal, is an unwarranted attack on the Eleventh Circuit. Their

challenge provides no colorable reason for even considering grant of certiorari in this case.[7]

[7] Petitioners' questionable speculation about the adequacy of the panel's actual review of the record is of no relevance here because the dissenting judge obviously reviewed and brought to the attention of the two other panel members the version of the purported "evidence" that petitioners argue was not considered, and because petitioners were granted leave to file (by Order dated June 28, 1989), and did file, an appendix containing the purported "evidence" with their petition for rehearing.

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

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